

**BOIES SCHILLER FLEXNER LLP**  
David Boies (admitted *pro hac vice*)  
333 Main Street  
Armonk, NY 10504  
Tel: (914) 749-8200  
dboies@bsflp.com

Mark C. Mao, CA Bar No. 236165  
Beko Reblitz-Richardson, CA Bar No. 238027  
Erika Nyborg-Burch, CA Bar No. 342125  
44 Montgomery St., 41st Floor  
San Francisco, CA 94104  
Tel.: (415) 293-6800  
mmao@bsflp.com  
brichardson@bsflp.com  
enyborg-burch@bsflp.com

James Lee (admitted *pro hac vice*)  
Rossana Baeza (admitted *pro hac vice*)  
100 SE 2nd St., 28th Floor  
Miami, FL 33131  
Tel.: (305) 539-8400  
jlee@bsflp.com  
rbaeza@bsflp.com

Alison L. Anderson, CA Bar No. 275334  
725 S Figueroa St., 31st Floor  
Los Angeles, CA 90017  
Tel.: (213) 995-5720  
alanderson@bsflp.com

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO  
individually and on behalf of all similarly  
situated.

Plaintiffs,

VS.

GOOGLE LLC

Defendant.

**SUSMAN GODFREY L.L.P.**  
Bill Carmody (admitted *pro hac vice*)  
Shawn J. Rabin (admitted *pro hac vice*)  
Steven M. Shepard (admitted *pro hac vice*)  
Alexander Frawley (admitted *pro hac vice*)  
1301 Avenue of the Americas, 32nd Floor  
New York, NY 10019  
Tel.: (212) 336-8330  
[bcarmody@susmangodfrey.com](mailto:bcarmody@susmangodfrey.com)  
[srabin@susmangodfrey.com](mailto:srabin@susmangodfrey.com)  
[sshepard@susmangodfrey.com](mailto:sshepard@susmangodfrey.com)  
[afrawley@susmangodfrey.com](mailto:afrawley@susmangodfrey.com)  
  
Amanda K. Bonn, CA Bar No. 270891  
1900 Avenue of the Stars, Suite 1400  
Los Angeles, CA 90067  
Tel.: (310) 789-3100  
[abonn@susmangodfrey.com](mailto:abonn@susmangodfrey.com)  
  
**MORGAN & MORGAN**  
John A. Yanchunis (admitted *pro hac vice*)  
Ryan J. McGee (admitted *pro hac vice*)  
201 N. Franklin Street, 7th Floor  
Tampa, FL 33602  
Tel.: (813) 223-5505  
[jyanchunis@forthepeople.com](mailto:jyanchunis@forthepeople.com)  
[rmcghee@forthepeople.com](mailto:rmcghee@forthepeople.com)  
  
Michael F. Ram, CA Bar No. 104805  
711 Van Ness Ave, Suite 500  
San Francisco, CA 94102  
Tel: (415) 358-6913  
[mram@forthepeople.com](mailto:mram@forthepeople.com)

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' ADMINISTRATIVE  
MOTION FOR RELIEF RE: GOOGLE'S  
PRODUCTION OF DOCUMENTS  
IMPROPERLY WITHHELD AS  
PRIVILEGED**

## Referral: The Honorable Susan van Keulen

## **INTRODUCTION**

With additional productions made over the past few weeks, Google has now produced 1,370 documents previously withheld as privileged. Without the Court’s assistance, Google would have gotten away with improperly withholding these documents. After reviewing some but not all of the documents recently produced, Plaintiffs can now report that these were not close privilege calls, and many include admissions that concern contested issues in this case. For example:

- Google had improperly withheld as privileged an email from Google engineer Bert Leung (whom Plaintiffs deposed, without this document) where he wrote that [REDACTED]
- Google had improperly redacted as privileged a comment to a document where Google engineer Sammit Adhya (whom Plaintiffs deposed, without this quote) wrote [REDACTED]

There is no indication that any portion of the document is privileged, calling into question why Google redacted that key admission.

Google’s belated production of these and other key documents (detailed in the Exhibit A summary chart) has severely prejudiced Plaintiffs. Google should have produced these documents last year, before depositions, before the close of fact discovery, before expert discovery, and before class certification briefing. Given Google’s late production, Plaintiffs were never able to question any witnesses about these documents or conduct other follow up discovery.

For over a year, Plaintiffs diligently sought re-review of the same categories of documents that this Court ultimately ordered Google to re-review. Had Google taken Plaintiffs' concerns seriously last year, Google would have timely produced these documents. Instead, Google gained an unfair advantage, depriving Plaintiffs of access to these key documents until after the close of fact discovery, after service of opening expert reports, and after Plaintiffs filed their motion for class certification.

<sup>1</sup> All exhibits are attached to the concurrently filed Declaration of Mark Mao.

1 To remedy the prejudice caused by Google's untimely production, Plaintiffs now seek a  
 2 preclusion order, but a limited one relating only to these documents. Alternatively, Plaintiffs seek  
 3 to conduct a limited number of depositions to question witnesses about certain documents.

4 **BACKGROUND**

5 Plaintiffs for over a year diligently sought production of documents that Google improperly  
 6 withheld as privileged. After Google served its first privilege logs on July 24, 2021 and August  
 7 29, 2021, Plaintiffs promptly identified numerous deficiencies, including that Google was  
 8 withholding communications between non-attorney employees and also communications where  
 9 an attorney was copied but seemingly did not respond. Mao Decl. ¶¶ 3-6. Plaintiffs sought relief  
 10 from this Court in October 2021. Dkt. 296 & 296-1. Google assured the Court that its privilege  
 11 review was "robust" and belittled Plaintiffs' concerns as "rife with half-baked disputes ill-suited  
 12 for court intervention." Dkt. 296 at 5. This Court permitted Plaintiffs to request Google's re-review  
 13 of certain documents, which Plaintiffs diligently sought. Dkt. 307. Plaintiffs' challenges were  
 14 overwhelmingly successful, resulting in an initial correction rate of 25% and Google's production  
 15 of over 200 documents in February and March 2022. Dkt. 522 at 2. Plaintiffs then sought further  
 16 re-review, which this Court granted, ordering Google to re-review 1,000 documents that fell within  
 17 the two suspect categories. Dkt. 542. That review resulted in Google re-designating 371 documents  
 18 in April 2022 (37.1%). Dkt. 566. As a result, this Court ordered Google to re-review all documents  
 19 in those categories, Dkt. 605, which resulted in Google producing 907 additional documents in  
 20 June and July 2022, Mao Decl. ¶ 14.

21 **ARGUMENT**

22 **I. Plaintiffs Are Entitled to a Limited Preclusion Order.**

23 To address the prejudice resulting from Google's late productions, Plaintiffs respectfully  
 24 request a limited preclusion order relating to the documents that Google improperly withheld as  
 25 privileged and produced after the March 4, 2022 close of fact discovery, ordering that:

26

- 27 • Plaintiffs may admit any of these documents at any time without a sponsoring witness;
- 28 • For the duration of the case, Google may not affirmatively rely on any of these  
 documents for any purpose; and

1       • For the duration of the case, Google may not rely on any witness for the purpose of  
 2       rebutting Plaintiffs' arguments about what these documents convey. For example,  
 3       Google may not use a witness to argue that Plaintiffs have misinterpreted a document.

4       This relief is warranted under Federal Rule of Civil Procedure 37(b). "If a party . . . fails  
 5       to obey an order to provide or permit discovery . . . the court where the action is pending may issue  
 6       further just orders." Fed. R. Civ. P. 37(b)(2)(A). Here, Google's improper withholding of non-  
 7       privileged documents violated this Court's August 12, 2021 order that "[d]ocument productions to  
 8       be completed . . . by October 6, 2021." Dkt. 242-1 at 1. An instructive case is *Sherwood Brands,*  
 9       *Inc. v. Pennsylvania Manufacturers' Association*, 2010 WL 11469874, at \*6 (D.R.I. Sept. 30,  
 10      2010). There, in response to a party's post-discovery production of a "plainly relevant" document,  
 11      the court applied Rule 37(b) to take certain facts from the document as established. Here, Plaintiffs  
 12      actually seek a more lenient sanction—preclusion. That relief is warranted, particularly to "ensure  
 13      that [Google] will not be able to profit from its own failure to comply." *Sas v. Sawabeh Info. Servs.*,  
 14      2015 WL 12711646, at \*9 (C.D. Cal. Feb. 6, 2015). Google produced key documents long after  
 15      the close of fact discovery and even after the deadline for opening expert reports, including all  
 16      documents summarized in the Exhibit A chart. In doing so, Google deprived Plaintiffs of an  
 17      opportunity to obtain additional discovery about these documents, including discovery to (1)  
 18      further support these documents' admissibility and (2) determine how Google may try to counter  
 19      Plaintiffs' reliance on these documents (at any stage of the case). Without that additional  
 20      discovery, Plaintiffs have no way to rebut any Google say-so regarding these documents.

21       Additional discovery at this late juncture cannot cure the prejudice. In this Court's words:  
 22      "Litigation cannot work if a party is free to withhold responsive documents . . . and [later] . . .  
 23      simply state additional discovery can cure any prejudice." Dkt. 593-3 at 29 (citation omitted). "The  
 24      issue is not whether [Plaintiffs] eventually obtained the information that they needed, or whether  
 25      [Google is] now willing to provide it, but whether [Google's] repeated failure to provide  
 26      documents and information in a timely fashion prejudiced the ability of Plaintiffs to prepare their  
 27      case for trial." Dkt. 593-3 at 29 (citation omitted). With expert reports completed, and expert  
 28      discovery nearing its close, nothing short of re-opening all discovery (which Plaintiffs do not wish

1 to do) would put the parties back in the positions they would be had Google complied. The limited  
 2 preclusion orders requested above are appropriate to address the prejudice.

3 Finally, while Plaintiffs need not establish that Google acted with negligence or in bad  
 4 faith, Google's privilege review was anything but "robust." Dkt. 296 at 5. As just two examples:

5 • Google entirely withheld a [REDACTED]

6 [REDACTED] Google did not identify  
 7 Mr. Horling in its list of over 200 potential custodians (Dkt. 429-11), nor did Google  
 8 identify him in its interrogatory response listing employees (Dkt. 429-15).

9 • Google withheld in its entirety an [REDACTED]

10 [REDACTED] And  
 11 like Mr. Horling, Google did not previously identify Mr. Nicolao in its list of over 200  
 12 potential custodians (Dkt. 429-11), nor did Google identify him in its interrogatory  
 13 response listing employees (Dkt. 429-15).

14 Even a cursory privilege review should have caught such blatant mis-designations, and earlier  
 15 production would have enabled Plaintiffs to seek and obtain additional relevant discovery.

16 **II. Alternatively, Plaintiffs Should Be Permitted to Conduct Additional Limited  
 17 Depositions, With Google Bearing All Attorneys' Fees, Expenses, and Costs.**

18 Having already committed many millions of dollars to litigating this case, Plaintiffs are not  
 19 eager to incur the cost of additional depositions, nor will Plaintiffs agree to move any case  
 20 deadlines. Regardless, if the Court is unwilling to grant the relief requested above, Plaintiffs  
 21 alternatively seek permission to at least proceed with a process that will provide an opportunity to  
 22 obtain deposition testimony regarding certain key documents.

23 Courts routinely grant requests to re-open depositions where a party improperly withheld  
 24 documents, including on privilege grounds. For example, in *Curry v. Contra Costa County*, 2013  
 25 WL 4605454, at \*4 (N.D. Cal. Aug. 28, 2013), following *in camera review*, the court ordered  
 26 production of four documents and permitted the defendant to "re-open Plaintiff's deposition for  
 27

1 no more than one hour for the purpose of questioning her regarding these four documents.” *Id.*;  
 2 *see also Prado v. Federal Express Corp.*, 2014 WL 11412632, at \*1 (N.D. Cal. July 29, 2014) (“in  
 3 light of the delinquent production in this case, some additional deposition testimony is warranted”).

4 Plaintiffs propose the following framework to guide any additional depositions:

- 5 1. Plaintiffs identify up to 40 documents produced by Google after the close of fact  
 discovery, including by specifying the portion of the document that Plaintiffs want to  
 ask about. To the extent the author of any document or portion thereof is unclear,  
 Google provides that information to Plaintiffs. To the extent those documents include  
 any hyperlinks, the parties meet and confer on a process for Google to produce any  
 hyperlinked documents requested by Plaintiffs.
- 6 2. The parties meet-and-confer to select a deponent for each document, including  
 hyperlinks, who will presumptively be the author (or authors) of the specified portion.  
 For any witness whom Plaintiffs have already deposed, Plaintiffs will be given 30  
 additional minutes with that witness for each document the witness will cover. For any  
 new deponent, Plaintiffs will get the same 30 minutes per document, plus an additional  
 30 minutes to cover background information concerning that new witness.
- 7 3. Following meet-and-confers, the parties raise any disputes with the Court, such as a  
 dispute over which witness should cover particular documents or whether hyperlinks  
 should be produced.
- 8 4. After these depositions, Plaintiffs may revisit their request for a preclusion order.

9 Google should also be required to “pay the reasonable expenses, including attorneys’ fees,  
 10 caused by [its] failure” to timely produce the documents. Fed. R. Civ. P. 37(b)(2)(C). Google’s  
 11 withholding of the documents was not substantially justified, particularly given the significant  
 12 correction rate of its re-review. In addition to the fees and expenses Plaintiffs incurred with this  
 13 Motion, Google should pay all attorneys’ fees, costs, and expenses that Plaintiffs incur preparing  
 14 for and taking these depositions. *See Balsam Brands Inc. v. Cinmar*, 2016 WL 7101940, at \*2-3  
 15 (N.D. Cal. Dec. 6, 2016) (requiring offending party to pay all costs and attorneys’ fees incurred  
 16 for non-offending party’s second deposition of an expert, which was necessary due to offending  
 17 party’s violation of a court order); *Obayashi Corp. v. Chartis Specialty Ins. Co.*, 2012 WL  
 18 12509224, at \*3 (W.D. Wash. Aug. 3, 2012) (same, as applied to a second 30(b)(6) deposition).

19 **CONCLUSION**

20 Plaintiffs respectfully request that the Court award the relief requested above and any other  
 21 relief it deems appropriate. Plaintiffs will also provide additional briefing upon request.  
 22

1 Dated: August 8, 2022

Respectfully submitted,

2 By: /s/ Mark Mao

3  
4 Mark C. Mao (CA Bar No. 236165)  
5 mmao@bsflp.com  
6 Beko Reblitz-Richardson (CA Bar No. 238027)  
7 brichardson@bsflp.com  
8 Erika Nyborg-Burch (CA Bar No. 342125)  
9 Enyborg-burch@bsflp.com  
10 BOIES SCHILLER FLEXNER LLP  
11 44 Montgomery Street, 41<sup>st</sup> Floor  
12 San Francisco, CA 94104  
13 Telephone: (415) 293 6858  
14 Facsimile (415) 999 9695

15 David Boies (*pro hac vice*)  
16 dboies@bsflp.com  
17 BOIES SCHILLER FLEXNER LLP  
18 333 Main Street  
19 Armonk, NY 10504  
20 Telephone: (914) 749-8200  
21 James W. Lee (*pro hac vice*)  
jlee@bsflp.com  
22 Rossana Baeza (*pro hac vice*)  
rbaeza@bsflp.com  
23 BOIES SCHILLER FLEXNER LLP  
100 SE 2<sup>nd</sup> Street, Suite 2800  
24 Miami, FL 33130  
Telephone: (305) 539-8400  
Facsimile: (305) 539-1304

25 William Christopher Carmody (*pro hac vice*)  
bcarmody@susmangodfrey.com  
26 Shawn J. Rabin (*pro hac vice*)  
srabin@susmangodfrey.com  
27 Steven Shepard (*pro hac vice*)  
sshepard@susmangodfrey.com  
28 Alexander P. Frawley (*pro hac vice*)  
afrawley@susmangodfrey.com  
SUSMAN GODFREY L.L.P.  
1301 Avenue of the Americas, 32<sup>nd</sup> Floor  
New York, NY 10019  
Telephone: (212) 336-8330

Amanda Bonn (CA Bar No. 270891)  
abonn@susmangodfrey.com  
SUSMAN GODFREY L.L.P.  
1900 Avenue of the Stars, Suite 1400

1 Los Angeles, CA 90067  
2 Telephone: (310) 789-3100

3 John A. Yanchunis (*pro hac vice*)  
4 jyanchunis@forthepeople.com  
5 Ryan J. McGee (*pro hac vice*)  
6 rmcgee@forthepeople.com  
7 MORGAN & MORGAN, P.A.  
8 201 N Franklin Street, 7th Floor  
9 Tampa, FL 33602  
10 Telephone: (813) 223-5505  
11 Facsimile: (813) 222-4736

12 Michael F. Ram, CA Bar No. 104805  
13 MORGAN & MORGAN  
14 711 Van Ness Ave, Suite 500  
15 San Francisco, CA 94102  
16 Tel: (415) 358-6913  
17 mram@forthepeople.com

18 *Attorneys for Plaintiffs*